IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 446 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE R.P.DHOLAKIA

HONOURABLE MR.JUSTICE A.S.DAVE

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge?

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SHEIKH USMAN SHEIKH NOORMOHMAD - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MS SUBHADRA G PATEL for Appellant(s) : 1,
MS NANDINI JOSHI, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.P.DHOLAKIA
and
HONOURABLE MR.JUSTICE A.S.DAVE
Date : 26/04/2006

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE R.P.DHOLAKIA)

1.This appeal under Sec.374 of the Code of Criminal Procedure has been preferred by the appellant who has been charged and tried for

the offences punishable under Sec.302 of Indian Penal Code in Sessions Case No.114 of 2001 wherein he was convicted to suffer imprisonment for life and fine of Rs.2,000/-, in default, to suffer simple imprisonment for four months by the learned Additional Sessions Judge, Surat by the judgment and order dated 21-4-2001.

2.The case of the prosecution in short is that deceased Jubeda Saiyed was staying with Usmankhan Sabbirkhan Pathan, who was previously married to one Samimbanu but as their relations became strange, Samimbanu was staying with her parents and deceased Jubeda started to reside with Usmankhan Pathan behind Vadivala Baba Darga, Surat. On the day of incident i.e. on 14-2-2000 at about 18.00 hours when Jubeda was standing near Batha's pole on the road, Shaikh Usman Shaikh Noor Mohammad, the real brother of Samimbanu came there and altercations took place between him and deceased regarding future of his sister Samimbanu and thereafter said

Shaikh Usman Shaikh Noor Mohammad sprinkled kerosene from the plastic can he was carrying upon Jubeda and enlightened the match stick on her and therefore, she received severe burns injuries. Nobody tried to save her and ultimately when her husband came, he and one Iqbal Razak Shaikh took her into an autorickshaw to New Civil Hospital. On receiving the vardhi, PSI, Mohansinh Fatehsinh Baria, Salabatpura Police Station went to Civil Hospital and recorded the complaint Ex.25 of the complainant Jubeda. Thereafter, he made arrangements to register the same and PSO of Salabatpura Police Station registered the same as Salabatpura Police Station C.R.No.I-38 of 2000 under Sec.307 of Indian Penal Code. Thereafter, he handed over further investigation to PI, Shri N.N.Patel and, therefore, Shri Patel went to New Civil Hospital. Since on an inquiry he found the physical condition of Jubeda not being good, it

was decided to record her dying declaration and, therefore, he sent yadi for recording the dying declaration of Jubeda to Executive Magistrate. Executive Magistrate on receiving yadi came to Civil Hospital and recorded the dying declaration of Jubeda. Thereafter, Shri Patel started further investigation and recorded statements of witness Ramdas Gopalbhai and others and also started search of accused. Meanwhile, he prepared panchnama of scene of offence and also seized burned clothes, plastic can, etc. from the scene of offence in presence of panchas. Meanwhile, as Jubeda succumbed to injuries, he made arrangements for inquest panchnama and added Sec.302 of IPC under intimation to the Court. He also recorded statements of witness namely, Lalchand, Faridabi, Aswin Ugra Patel, Bhagvansinh Jagatsinh, etc. and thereafter arrested the accused on 15-2-2000. He also prepared arrest panchnama of accused and also made arrangements

for sending the body for post mortem and on arrival of post mortem report, it was kept with the investigation papers and also send muddamal namely viscera and other muddmal into FSL. At the end of investigation, charge sheet was submitted into the Court of learned Judicial Magistrate (First Class), Court No.1 on 12-5-2000 and it was numbered as Criminal Case No.1045 of 2000. As the offence was exclusively triable by Court of Sessions, learned Metropolitan Magistrate (First Class), Court No.1, committed the case to the Court of Sessions on 22-5-2000 where it was numbered as Sessions Case No.114 of 2000. Learned Addl. Sessions Judge framed charge against the accused at Ex.5. Charge was read over and explained to the accused. The accused pleaded not guilty to the charge and prayed for trial.

3.To prove the charge against the accused, prosecution examined, in all, 13 witnesses and also placed reliance upon documentary evidence

numbering 9. On submission of closing purshis Ex.33 by the prosecution, learned Judge recorded further statement of the accused under Sec.313 of Cr.P.C. qua the incriminating question wherein the accused came out with the case of total denial. The accused did not examine any witness nor stepped into the witness box. Therefore, after hearing the learned counsel appearing for the respective parties, learned Addl. Sessions Judge delivered the impugned judgment giving rise to prefer the present appeal.

4.We have heard leaned counsel for the appellant, Ms.Subhadraben Patel and learned APP, Ms.Nandini Joshi for the respondent-State.

5.Learned counsel for the appellant, Ms.Subhadraben Patel mainly argued that there was no eye witness of the incident and no cogent and convincing evidence has been produced on record to connect the appellant with the crime in question and, therefore,

judgment and order is required to be quashed and set aside. Conviction is based solely on the dying declaration of the deceased which, according to her, is a weak piece of evidence. There is no other evidence to connect the appellant with the crime in question except this dying declaration which is not trustworthy and therefore, court ought not to have convicted the appellant accused only on the basis of said dying declaration and in absence of any corroborate piece of evidence, the appellant ought to have been acquitted. She further argued that though the incident took place on public road during day time, there is no eye witness and, therefore, it creates doubt in the mind of the Court and therefore also, appellant may be acquitted. There are many contradictions in the statements of prosecution witnesses. Not only that, theory of self pouring kerosene cannot be ruled out looking to the facts and circumstances of the case. In

this regard, she took us through the evidence of prosecution witness No.4, Usmankhan Sabbirkhan Saiyed Ex.12, who, according to her, supported the theory of self pouring of kerosene which ought to have been considered by the court below. It was further argued that as the deceased spoiled the life of sister of the appellant accused, the alleged incident took place and therefore, it can be said to be a case of sudden provocation falling under Part II of Sec.304 and not under Sec.302 of IPC.

6. Learned APP, Ms.Nandini Joshi, on the other hand, supported the judgment and order of conviction on the ground that prosecution could prove the case under Sec.302 against the appellant accused beyond reasonable doubt. It was further argued that if dying declaration appears to be a trustworthy evidence and free from doubt, court can certainly rely upon the same and base conviction. In this regard, she placed reliance upon the cases of Rameshkumar

Madaji Marwadi Vs. State of Gujarat, 1999(1) G.L.H. 94 and also of Laxman Vs. State of Maharashtra, (2002)6 S.C.C. 710. After taking us through the relevance evidence on record and relevant portion of the impugned judgment, she argued that prosecution was able to prove that the dying declaration is a trustworthy evidence and free from doubt. It was also able to prove that the case is of homicidal and not suicidal. Moreover, motive is also established in this case though not required in this type of case. Over and above, presence of the appellant is also established as the deceased was staying with the sister's husband of the appellant accused. The deceased was knowing the appellant and the incident had taken place in a broad day light on a public road and at the earliest disclosed the name of the present appellant as the assailant with detailed description by way of complaint and also by way of dying declaration and, therefore, there will not be

any possibility of misidentification. She also took us through other evidence on record and argued that even prosecution got support from other evidence on record. Taking us through post mortem report, FSL report and inquest panchnama, it was argued that it is a heinous crime wherein young lady was killed by the accused at a public place by sprinkling kerosene and by enlightening match stick on her. Not only that, even nobody could save her as reflects from the evidence and other eye witness, who incidentally were present there as the persons having shops. Merely nobody supported the say of the prosecution does not necessarily mean that trustworthy evidence which is in the form of complaint and dying declaration can be discarded by the Court. It is rather unfortunate that people did not come forward to support the case of the prosecution as the deceased being a poor lady not having any shelter.

7.We have gone through oral as well as documentary evidence on record shown to us by the learned counsel for the respective parties along with the reasoned judgment and order of conviction passed by the court below.

8.It is established from the record that sister of the accused was staying at her parental house because of difference between husband and wife and as the deceased was staying with sister's husband of the appellant-accused, the accused sprinkled kerosene upon the deceased and enlightened the match stick on her in broad day light on public road and as a result of that, she received burns injuries and succumbed to the injuries resulting into an offence under Sec.302 of IPC. The prosecution is able to prove the case by way of complaint and dying declaration.

9.To prove the case, prosecution mainly relied upon the oral evidence of Executive Magistrate, Dinkarbhai Ruvaji Gamit, who was examined as

P.W.No.11 at Ex.19. According to him, on 14-2-2000 at about 7.45 p.m., since a yadi was received from Salabatpura Police Station for recording the dying declaration of one Jubedaben, he went to Civil Hospital where he contacted the doctor and inquired about the physical condition of Jubeda. As the doctor opined that the patient is conscious and fit for giving dying declaration, first he sent all the relatives outside the ward and thereafter started recording the dying declaration. It was stated by Jubedaben that her age is 20 and is in the hospital. About the incident, she stated that in the evening when she was standing on the road, one Shaikh Usman Shaikh Noor Mohammad came there with kerosene can and there was exchange of words between them and he sprinkled kerosene on her and put her on fire. At that time, her husband was not there. On completion of recording of dying declaration, he took right hand thumb impression of the

deceased and he also signed on the same. He proved both the dying declaration at Ex.20 and the yadi Ex.21. He was thoroughly cross examined by the learned counsel for the accused but nothing incriminating came on record so as to shake the same.

10.It clearly appears from para 7 of the dying declaration Ex.20 that name and description of the appellant was disclosed as Shaikh Usman Shaikh Noor Mohammed. Even in complaint which was filed at the earliest opportunity and registered by PSI, Mr.Mohansinh Fatehsinh Baria, who has examined as P.W.No.12 at Ex.24 and through whom, prosecution is able to prove the complaint Ex.25, the incident in detail has been narrated. Therefore, the complaint is fully supported by way of dying declaration.

11.To prove the case against the accused, prosecution also examined P.W.No.1, Dr.Swapnil Sudhirkumar Agrawal at Ex.7. As per the evidence of this doctor, post mortem has been

performed by two doctors. It is through the evidence of this doctor that the prosecution could prove the post mortem report at Ex.8. The prosecution also could prove the certificate Ex.9 as to the cause of death. According to him, at the time of performing post mortem, since viscera has been taken out and sent to FSL, the cause of death has been kept reserve and it is on receiving the FSL report that cause of death has been opined by the doctors at Ex.9. It reflects from the above referred evidence as well as from column No.17 of the post mortem that she received 95% injuries practically on the whole parts of her body. It was categorically opined by the doctor that injuries sustained by the deceased were anti-mortem and were due to burns. It was also opined that the injuries received by the deceased could be possible by way of incident as happened. Said doctor has been cross examined by the learned counsel for the accused

wherein also nothing adverse came on record.

12.By way of above referred evidence, prosecution is able to prove that it is a case of homicide and not suicide. Court below has dealt with the same in detail on the basis of evidence i.e. complaint Ex.25, dying declaration Ex.20, evidence of doctor, who performed the post mortem, post mortem report and also other evidence. We are of the opinion that court below has rightly come to the conclusion that it was a case of homicide and not suicide. Once it is so established, then comes the question regarding the role of the present appellant accused with the crime in question.

13.There are evidence on record by way of complaint, dying declaration and other incidental evidence which proved that it is the appellant accused who came there along with plastic can of kerosene and sprinkled it on the deceased and enlightened the match stick on her who was just standing on the road in broad day

light and at the earliest narrated the incident disclosing the name of the assailant accused with his role. The evidence in the form of complaint, dying declaration and evidence of Executive Magistrate appeared to be trustworthy wherein role of the present appellant has been established. Not only that, prosecution is able to connect the same by way of other evidence i.e. plastic can of kerosene collected from the scene of offence along with other evidence supporting the say of the deceased. As the deceased and accused were knowing each other, possibility of misidentification, question of tutoring or falsely involving the accused may not arise at all. Apart from that, prosecution is able to establish motive also i.e. the sister of the appellant accused was at her parental house and in her place, deceased Jubeda entered and started residing with the husband of his sister Samimbanu. The appellant accused being brother of Samimbanu was very

much concerned about all these things and hence, with the intention and motive in mind, he came there along with the can of kerosene and sprinkled it and put her on fire resulting the offence under Sec.302. There are other evidence which also connect the accused with the crime. It is true that husband of the deceased did not support the say of prosecution and has been declared as hostile by the prosecution. We are not entering into the above arena except in saying that prosecution is able to get support from other evidence also. Law on this point is clear that if dying declaration is trustworthy and free from doubt, then conviction can be based only on the said dying declaration and it does not require any corroboration. Keeping in mind the above principle, we are of the opinion that the complaint has been recorded at the earliest opportunity and the dying declaration is trustworthy and it has been recorded by taking

care and caution by the Executive Magistrate and nothing adverse has come out in his cross examination.

14.An argument has been raised by the learned counsel for the appellant that the incident which has been taken place all of a sudden out of provocation and hence, looking to the nature of offence, it cannot be said to be an offence falling under Sec.302 but under Sec.304 Part II of IPC.

15.We have given thoughtful consideration qua above referred submission. Evidence on record clearly shows that there was enmity and there was specific motive on the part of accused because the deceased has entered into the place of sister of the accused and, therefore, he went to the scene of offence along with all preparations i.e. plastic can of kerosene and match stick and sprinkled kerosene on the deceased and enlightened the match stick on her and she was killed. In these circumstances, it

cannot be said that incident has taken place all of a sudden due to sudden provocation so as to treat the case as the one falling under Sec.304 Part II. On the contrary, it can be said that it is a planned murder wherein young lady aged about 20 years has been killed for no reasons.

16.In the entirety of the facts and circumstances narrated hereinabove, we are of the opinion that the impugned judgment and order of conviction passed by the court below is just, legal and proper warranting no interference by this Court in the present appeal. Hence, this appeal is required to be rejected.

17.This appeal is accordingly rejected.

(R.P.DHOLAKIA,J.)

(A.S.DAVE, J.)

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